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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:) PACA Docket No. D-97-0024
)
H. Schnell & Company, Inc.,)
)
Respondent) Decision and Order

Preliminary Statement

This is an administrative disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930 as amended, (7 U.S.C. § 499a et seq.), hereinafter sometimes referred to as the "PACA"; the regulations promulgated pursuant thereto, and the Rules of Practice governing formal adjudicatory administrative proceedings instituted by the Secretary (7 C.F.R. §§ 1.130 *et seq.*).

A Complaint was filed on May 29, 1997, alleging that the Respondent failed to make full payment promptly to 39 sellers for purchases of 317 lots of perishable agricultural commodities in the course of interstate or foreign commerce in the amount of \$2,435,869.17 during the period January 22, 1995 through April 14, 1996 and to 9 consignors of net proceeds in the amount of \$1,103,343.19 resulting from the sale of 41 lots of perishable agricultural commodities which Respondent received and accepted on consignment in the course of interstate or foreign commerce during the periods September 17, 1995 through April 2, 1996.

The Complainant requested the sanction of a finding that Respondent committed willful, repeated and flagrant violations of section 2(4) of the PACA and a publication of that finding. Respondent filed an Answer, generally denying the allegations of the Complaint.

The case was assigned to me and a hearing date was scheduled for May 20, 1998. Prior thereto on March 17, 1998, the Complainant filed a Motion for a Decision Without Hearing, to which Respondent filed no objection. Complainant requested a conference call to determine whether Respondent would be able to make full payment of its produce indebtedness and be in full compliance with the PACA by the date of the hearing, May 20, 1998. During said conference call it was revealed that as of that time the Respondent owed \$1,557,776.93 to produce creditors for the transactions set forth in the Complaint and that Respondent had no expectation of making full payment by the date set for hearing in the matter.

On May 14, 1998, I issued a Decision Without Hearing and on May 14, 1998 the oral hearing scheduled to commence May 20, 1998 was cancelled. The Decision Without Hearing which I issued found that the Respondent had committed willful, flagrant or repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and the findings were ordered published.

Pursuant to extension therefor the Respondent filed an appeal to the Judicial Officer: "*** * *** on the sole basis that the decision of Judge Baker was rendered without affording the Respondent an oral hearing at which the Complainant would be required to prove its case. Absent a hearing, the Respondent is denied due process because of the employment restrictions which would result from a finding that the Respondent had committed unlawful, flagrant and repeated violations of section 2(4) of the PACA."

By Order dated September 17, 1998, the Judicial Officer ordered: "The Decision Without Hearing, filed on May 14, 1998, is vacated, and this proceeding is remanded to the ALJ to afford Respondent an opportunity for a hearing."

In response thereto, the Administrative Law Judge set a new hearing date for February 2, 1999, which occurred as scheduled. At that hearing, Complainant was represented by Andrew Y. Stanton, Esquire, Office of the General Counsel, Washington, D.C. and Respondent was represented by Paul T. Gentile, Esquire, Gentile and Dickler, 15 Maiden Lane, New York, New York 10038. Complainant called four witnesses and submitted evidence into the record. (EX 1-8). Respondent called no witnesses and did not submit any evidence. A transcript of the hearing was prepared. Both parties were given the opportunity to file briefs of proposed findings of fact, conclusions and an order, together with authorities in support thereof. The Complainant filed proposed corrections to the transcript and "Complainant's Proposed Findings of Fact, Conclusions and Order" on March 16, 1999.

The Respondent filed nothing, except a faxed notation to the Hearing Clerk on March 16, 1999, wherein it is set forth:

"Ms. Dawson:

Please be advised that the Respondent in the above referenced case waives presentation of a brief and reserves the right to respond to Complainant's brief.

Paul T. Gentile."

Thus, the Respondent has been given full opportunity for an oral hearing.

It is noted that the Respondent raised due process considerations by referencing the fact that employment sanctions might result from a finding that it engaged in willful, flagrant and repeated PACA violations. The question of whether certain persons were responsibly connected to Respondent was not an issue in this proceeding. Persons affiliated with Respondent whom the PACA Branch had determined to be responsibly connected to Respondent under 7 C.F.R. § 47.49 could

have appealed such determinations by filing a Petition for Review, resulting in a hearing before an Administrative Law Judge (7 C.F.R. § 1.133(b)(2)). However, Petitions for Review were never filed in this matter. Thus persons affiliated with Respondent elected not to pursue the process available to them for the adjudication of their responsibly connected status.

During the hearing the Respondent indicated:

Judge Baker: * * * Do you wish to proceed with your case?

Mr. Gentile: No, your honor.

Judge Baker: Do you intend to present a case?

Mr. Gentile: No I don't. I am going to rely on the record and the deficiencies in the Complainant's case.

Judge Baker: Very well, Thank you * * *. (Tr. 106).

The reliance by the Respondent upon the deficiencies in the Complainant's case is ill advised and not sufficient to overcome the preponderance of the evidence which was adduced by the Complainant in support of its allegations. I have carefully considered Respondent's objections made at the oral hearing and have found them, in totality, to be wanting in persuasiveness. The Respondent objected to the evidence at the hearing upon various grounds such as incompetent evidence (Tr. 49); objections were made relating to hearsay (Tr. 61-63); questions were raised as to documentation relating to a lawsuit filed by the trust creditors of Respondent (Tr. 84); objections were made to an affidavit as hearsay not subject to cross-examination (Tr. 91); and questions were raised relating to whether a reparation order was properly served. (Tr. 100).

The most weighty objection made by the Respondent with respect to the alleged deficiencies in the Complainant's case relates to counsel's statement set forth in the transcript (Tr. 66) as follows:

Mr. Gentile: Of course I knew that was the issue, Your Honor. I think counsel again misses the point. The issue is the proof. I fully anticipated that the Complainant would come to this hearing with proof, acceptable, admissible, probative, material proof. A chart made up by an investigator based upon phone calls is not proof of payment. It is not acceptable.

The hearing officer -- I mean the judicial officer, to my recollection, has never said that you can come to a hearing and present a chart through an investigator, and that suffices it to show what is unpaid at the time of the hearing. I don't believe he has ever said that. So I don't believe that is the law.

That is the nature of the objection, not the other matters which counsel has alluded to. (Tr 66).

I have considered these various objections, as well as others, made by the Respondent and have found them sufficiently lacking in persuasiveness to the extent that they detract from the amount and quality of the proof adduced by the Complainant. Moreover, with respect to many of these matters, the question of whether or not these payments had been made and the extent thereof, was information available to the Respondent itself. Certainly, it was in a position to dispute the evidence of the Complainant had Respondent believed such charts and other evidence were incorrect or were deficient. Respondent did not do so.

Accordingly, inasmuch as the Complainant's proposed findings of fact are adequately supported by the record, such findings of fact have, for the most part, been incorporated and are adopted herein.

Pertinent Statutory Provisions

1. Section 2(4) of the PACA (7 U.S.C. § 499b(4))

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 5(c). However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this Act.

2. Section 8(a) of the PACA (7 U.S.C. § 499h(a))

AUTHORITY OF SECRETARY. Whenever (1) the Secretary determines, as provided in section 6, that any commission merchant, dealer, or broker has violated any of the provisions of section 2, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

Findings of Fact

1. Respondent, H. Schnell & Company, Inc., is a corporation organized and existing under the laws of the State of New York. At the time of the transactions set forth in the Complaint, Respondent's business mailing address was 243 B NYC Terminal Market, Bronx, New York 10474. (CX 1). Respondent went out of business on March 18, 1996. (Tr. 97, 113).

2. Pursuant to the licensing provisions of the PACA, license number 680815 was issued to Respondent on November 2, 1967. This license automatically terminated on November 2, 1996, due to Respondent's failure to pay the required annual license renewal fee. (CX 1).

3. Complainant initiated an investigation of Respondent in May, 1996, based on numerous complaints received by Complainant's New Brunswick, New Jersey office indicating that Respondent had failed to pay for produce. (Tr. 16,19).

4. Gary Nefferdorf, a marketing specialist employed by Complainant's New Brunswick, New Jersey office, was assigned to conduct the investigation of Respondent. (Tr. 17). Mr. Nefferdorf carried out his investigation at Respondent's place of business from May 6, 1996 (Tr. 19), through approximately May 15, 1996. (Tr. 51). When Mr. Nefferdorf arrived at Respondent's place of business, the only person of authority present was Margaret Senzer, who identified herself as Respondent's office manager. (Tr. 19).

5. Mr. Nefferdorf served upon Ms. Senzer an April 30, 1996, letter from the Chief of the PACA Branch, stating that Mr. Nefferdorf was conducting an investigation of Respondent pursuant to allegations that Respondent had violated the prompt payment requirements of the PACA (CX 1a; Tr. 18-19).

6. Ms. Senzer provided Mr. Nefferdorf with an accounts' payable computer printout indicating Respondent's unpaid produce transactions. (CX 2; Tr. 19-21). From the information contained in this printout, Mr. Nefferdorf was able to obtain Respondent's file jackets containing records showing what Respondent owed to produce suppliers. (CX 4a-4ll, 6a-6h; Tr. 21).

7. Some of Respondent's records indicated that payment had been made on certain transactions through the issuance of checks. (Tr. 38). However, according to Ms. Senzer, many of the checks referred to in Respondent's records were never issued. (Tr. 38-39).

8. According to Respondent's records, as of May, 1996, Respondent had failed to make prompt payment and owed \$2,435,869.17 to 39 sellers for purchases of 317 lots of perishable agricultural commodities in the course of interstate or foreign commerce during the period January 22, 1995, through April 14, 1996, and owed \$1,103,343.19 to nine consignors consisting of net proceeds resulting from the sale of 41 lots of perishable agricultural commodities which Respondent received and accepted on consignment in the course of interstate or foreign commerce during the period September 17, 1995 through April 2, 1996. (CX 3, 5).

9. Mr. Nefferdorf informed Ms. Senzer and Respondent's attorney, Mr. Gentile, that he had determined that approximately \$3,000,000.00 was past due and unpaid. (Tr. 50-52). Neither Ms. Senzer nor Mr. Gentile disputed Mr. Nefferdorf's findings. (Tr. 50, 52).

10. After leaving Respondent's place of business, Mr. Nefferdorf contacted certain produce suppliers to obtain sworn statements regarding the interstate nature of their transactions with Respondent. (Tr. 53-54).

11. In May, 1998 and January, 1999, Mr. Nefferdorf conducted follow-up investigations to determine if Respondent's produce suppliers had received any payment of the amounts owed by Respondent. (Tr. 55). The investigations were done in preparation for the hearing that was scheduled for May 20, 1998, but postponed (Tr. 55), and the hearing that took place on February 2, 1999. (Tr. 55). Mr. Nefferdorf contacted the suppliers by telephone. (Tr. 55). During Mr. Nefferdorf's January, 1999 investigation, he was able to contact some of Respondent's unpaid produce suppliers (Tr. 56-57), and was informed that Respondent still owed \$550,085.17 based on the transactions in the Complaint. (Tr. 58). Mr. Nefferdorf prepared a table setting forth the results of his January, 1999 telephone conversations with Respondent's produce suppliers. (CX 7).

12. At the time of the oral hearing, the evidence shows that Respondent owed at least \$550,085.17 to produce suppliers. Had this not been so, Respondent could have shown otherwise. It did not do so.

Discussions and Conclusions

At the February 2, 1999, hearing in this matter, Complainant presented extensive evidence supporting the allegations in its Complaint that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA by failing to make full payment promptly to numerous sellers and consignors of perishable agricultural commodities.

Complainant's investigator, Gary Nefferdorf, testified that he obtained evidence from Respondent's own records showing that Respondent had failed to make full payment promptly to 39 sellers for purchases of 317 lots of perishable agricultural commodities in the course of interstate or foreign commerce in the amount of \$2,435,869.17 during the period of January 22, 1995 through April 14, 1996, and to nine consignors of net proceeds in the amount of \$1,103,343.19 resulting from the sale of 41 lots of perishable agricultural commodities which Respondent received and accepted on consignment in the course of interstate or foreign commerce during the period September 17, 1995 through April 2, 1996. Mr. Nefferdorf also testified that he conducted a follow-up investigation in January, 1999, immediately before the February 2, 1999, hearing, which determined that Respondent still owed at least \$550,085.17 for the transactions in the Complaint.

Complainant also introduced testimony from witnesses, representing produce suppliers set forth in the Complaint, who testified about Respondent's failure to pay promptly and its harmful effect

on their businesses. John Mangia, president of Bacchus Associates, Monmouth, New Jersey, stated that Respondent originally owed about \$59,000.00 but eventually paid \$8,000.00, leaving \$51,000.00 currently owing. (Tr. 86). Mr. Mangia testified that Respondent's payment practices harmed his business. (Tr. 86). "You have to do at least \$700-800,000.00 worth of business in order to recoup that kind of money. We work on an 8 percent commission." Alan Elkin, owner of Alanco Corp., Bronx, New York, testified that Respondent originally owed approximately \$199,000.00 for produce purchases made in February and March, 1996. Mr. Elkin stated that Respondent paid \$83,000.00 in July, 1996 (Tr. 113) and \$86,000.00 in January, 1997 (Tr. 114), but never paid \$30,625.20. (Tr. 115). Mr. Elkin testified that Respondent's late payment and failure to make payment helped put his company, out of business (Tr. 115-116). Annabel D. Arena, a director of Frank Donio, Inc., submitted an affidavit (CX 8) in which she stated that Respondent originally owed \$51,300.00, made some payments and currently owes \$39,400.00. Ms. Arena stated that Respondent damaged her firm in a number of ways: "It decreased our company's profits, effected [sic] our cash flow, and made it harder to maintain our pay schedule. Our vendors are paid from 7 to 21 days. No later than 21 days."

Respondent elected not to call any witnesses or submit any evidence or to submit post-hearing briefs. The only documents introduced into the record by Respondent are its Answer, which consists of a general denial, and an appeal to the Judicial Officer, claiming that the May 14, 1998, Decision Without Hearing denied Respondent due process.

Respondent's failures to make full payment promptly for produce constitute willful, flagrant and repeated violations of the PACA. *In re: Caito Produce Co.*, 48 Agric. Dec. 602 (1989).

Although Respondent has offered no excuse for its failure to make full payment promptly, even if it had, no excuse would be acceptable. As stated by the Judicial Officer in *In re: Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 633 (1996):

The overriding doctrine set forth in *Caito* is that, because of the peculiar nature of the perishable agricultural commodities industry, and the Congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, excuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an extended period of time.

The appropriate sanction is a finding of the commission of willful, flagrant and repeated violations of section 2(4) of the PACA, and the publication thereof.

At the hearing, Complainant presented a witness, Basil W. Coale, Jr., senior marketing specialist with the PACA Branch, who gave testimony concerning Complainant's recommended sanction. Mr. Coale pointed out the severe harm that payment violations such as those committed by Respondent do to the perishable agricultural industry. (Tr. 77-78). Mr. Coale testified that, since Respondent does not currently have a PACA license, as it terminated in 1996, Complainant recommends the sanction of a finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA and publication of that finding. (Tr. 79). Mr. Coale stated that Complainant does not recommend a civil penalty in lieu of a finding of the commission of willful, flagrant and repeated violations, as, pursuant to the Judicial Officer's *Scamcorp* decision,^{1/} a civil

^{1/} *In re: Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527 (1998), where the Judicial Officer stated that, with regard to complaints alleging the failure to make full payment promptly under the PACA that are filed subsequent to the date of issuance of *Scamcorp*, if the respondent is not in full compliance with the PACA within 120 days after the complaint is served upon the respondent or the date of the hearing, whichever occurs first, the case will (continued...)

penalty is not appropriate as long as a Respondent has not made full payment of its produce obligations and/or is not in compliance with the PACA as of the date of the hearing. (Tr. 79-80).

It is the policy of the Judicial Officer, first adopted in *In re: Gilardi Truck and Transportation, Inc.*, 43 Agric. Dec. 118 (1984), that a license revocation is the only possible sanction when a PACA licensee has failed to make payment in accordance with the PACA and owes more than a *de minimis* amount to produce sellers by the date of the hearing or, if no hearing is held, by the time the Answer was due. If a Respondent has made full payment and is in full compliance with the PACA by the date of the hearing (or the time the Answer is due if no hearing is held), a license suspension is ordered. Since the 1995 amendments to the PACA, a civil penalty may be ordered in lieu of a suspension or revocation (7 U.S.C. § 499h(e)) if the Respondent's financial condition is sufficiently strong (*Scamcorp, Inc., supra*, at 569 n. 20), although a civil penalty is not appropriate as long as a Respondent has not made full payment of its produce obligations and/or is not in compliance with the PACA as of the date of the hearing. This principle has recently been affirmed in two decisions of the U.S. Court of Appeals for the Second Circuit; *Havana Potatoes of New York Corporation and Havpo, Inc. v. United States*, 136 F.3d 89 (2d Cir. 1997) and *Kanowitz Fruit and Produce Co., Inc. v. United States of America*, No. 97-4224, U.S. App. Lexis 28025 (2d Cir. October 29, 1998).

^{1/} (...continued)
be treated as a "no pay" case, and revocation will be the appropriate sanction. *Id.* at 548-549, 562 n. 3. The complaint in this case was filed prior to the issuance of *Scamcorp*. The Judicial Officer further stated that a civil penalty is not an appropriate sanction in a "no pay" case. *Id.* at 570-571.

As Respondent's PACA license has terminated, a finding of willful, flagrant and repeated violations of section 2(4) of the PACA and publication thereof is appropriate, rather than a license revocation.

In view of Respondent's failure to make full payment promptly of the amounts alleged in the Complaint and its failure to show compliance with the payment requirements of the PACA by the date of the hearing, the issuance of an order finding that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the PACA and publication of that finding are warranted.

Order

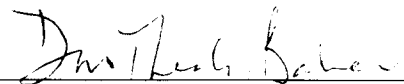
Respondent herein, H. Schnell & Company, Inc., is hereby found to have committed willful, flagrant and repeated violations of section 2(4) of the PACA.

This finding is ordered published.

This order shall become effective without further proceedings thirty-five (35) days after the service thereof upon the Respondent unless there is an appeal to the Judicial Officer within thirty (30) days after receiving service. (7 C.F.R. § 1.131, § 1.142, § 1.145, *et seq.*)

Copies hereof shall be served upon the parties.

Done at Washington, D.C.
this 16th day of April, 1999



Dorothea A. Baker
Administrative Law Judge